



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1803

SOUTHWEST KENWORTH, INC., an Arizona  
corporation,

Petitioner,

vs.

ARIZONA STATE TAX COMMISSION, a body  
corporate and politic, and JOHN M.  
HAZELETT, WALDO L. DeWITT, and BOB  
KENNEDY, as members of and constituting  
said Arizona Tax Commission, and THE STATE  
OF ARIZONA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS OF THE  
STATE OF ARIZONA, DIVISION ONE

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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ON PETITION FOR WRIT OF  
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MEMORANDUM FOR THE RESPONDENTS  
IN OPPOSITION

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The respondents herewith respond in  
opposition to the Petition for Writ of

Certiorari filed by the petitioner. It is the respondents' position that, contrary to the petitioner's assertions, the ruling of the court below upholding the imposition of the Arizona transaction privilege and education excise taxes in no way conflicts with this Court's holdings in Evco v. Jones, 409 U.S. 91 (1972) or American Oil Co. v. Neill, 380 U.S. 451 (1965).

Rather, the lower court decision is entirely in keeping with this Court's decisions in Complete Auto Transit, Inc. v. Brady, \_\_\_ U.S. \_\_\_, 97 S.Ct. 1076 (1977) and Standard Pressed Steel Co. v. Washington Department of Revenue, 419 U.S. 560 (1975). The thrust of the petitioner's claim herein is that this Court's rulings in Evco v. Jones, supra, and American Oil Co. v. Neill, supra, forbid the imposition of the taxes in question under Article I, Section 8, Clause 3 of the U.S.

Constitution. The petitioner also alleges a denial of its due process and equal protection rights under the Fourteenth Amendment of the U.S. Constitution.

In the Evco case, supra, New Mexico's Emergency School Tax and Gross Receipts Tax were invalidated as applied to the receipts from certain sales of tangible personal property. However, the opinion makes it clear that the reason that the taxes there constituted an impermissible burden upon interstate commerce was because of the New Mexico Court of Appeals' findings. While the New Mexico Attorney General argued that the taxes were imposed upon income resulting from intrastate services rendered by the taxpayer, the New Mexico Court of Appeals disagreed. It rejected any distinction between the taxes as imposed upon income arising from a contract of sale or from a contract for

services. See Evco v. Jones, 83 N.M. 110, 112, 488 P.2d 1214, 1215-16 (1971).

This Court held that the New Mexico court had found that the manufactured items of tangible personal property were the sine qua non of the contracts and that it was the sale of those items in other states that had been taxed. Since the New Mexico court had approved the imposition of a tax directly upon the proceeds of the out-of-state sales of tangible personal property, the taxes were invalidated.

In the case sub judice, on the other hand, the Arizona Court of Appeals made it perfectly clear that, under Arizona law, the taxable activity is the privilege of engaging in business in Arizona rather than the sale transaction itself. (See Petitioner's Brief, Appendix "A", pp.6-7). Based upon the record in this case, it cannot be logically argued that

the petitioner was not engaged in business within Arizona, a fact that petitioner concedes in its statement of the case. (See Petitioner's Brief, p. 3).

Thus, the problems recognized in the Evco case, supra, as well as in the J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938) and Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939) cases cited therein, do not exist in the instant case. This is particularly so with regard to the petitioner's contention that the risk of multiple taxation burdens requires the invalidation of the tax. (See Petitioner's Brief, p. 7). The Arizona Court of Appeals, citing this Court's decisions in Standard Pressed Steel Co. v. Washington Department of Revenue, supra; General Motors Corp. v. Washington, 377 U.S. 436 (1964) and Norton Co. v. Department of Revenue of Illinois, 340 U.S. 534 (1951), correctly held that the petitioner had

the burden of establishing that the transactions in question so burdened interstate commerce. This the petitioner failed to do.

With respect to the petitioner's reliance upon American Oil Co. v. Neill, supra, there a Delaware corporation licensed to do business in Idaho was held exempt from an Idaho motor fuel tax levied upon dealers who received such fuels within Idaho. The bids for fuel were submitted from the taxpayer's offices in Salt Lake City, Utah and were accepted in Seattle, Washington, the fuel being sold F.O.B. Salt Lake City. However, the case makes it plain that all of the elements of the transaction took place beyond Idaho's borders and that the other minimal activities of the taxpayer in Idaho, which were completely unrelated to the sale transaction were insufficient to provide the

requisite "nexus" to permit the tax.

In the case at bar, quite the opposite is true. Not only does the petitioner concede that it is engaged in business in Arizona, the Arizona Court of Appeals found that the particular sales were not dissociated from the local business within the meaning of the Norton Co. case, supra. While the petitioner selects those aspects of the transactions that it contends establish the totally interstate nature of the sales, it ignores those aspects which establish the intrastate nature of the taxable event, viz., engaging in business in Arizona.

The Arizona Court of Appeals specifically found and the evidence reveals that Southwest Kenworth, Inc., is an Arizona corporation with its principal place of business in Phoenix, Arizona; that over one-half of the petitioner's

employees were located in Arizona; that the petitioner maintained a large parts and service operation in Phoenix to service equipment sold to customers after the manufacturers' warranties expired; that this parts and service operation was admitted by the petitioner to be a vital part of its business activities; and that petitioner's employees regularly visited their customers (e.g. the mines) to determine parts needs and to maintain good business relationships. (See Petitioner's Brief, Appendix "A", p.11). In addition, the record clearly demonstrates that the petitioner's employees who had connections with those aspects of the transactions occurring outside of Arizona were themselves Arizona residents. The taxpayer had no offices in either New York or Missouri and there is no indication in the record that the petitioner even had resident personnel in

those states.

Furthermore, with respect to the specific sales transactions in question, the evidence showed and the Court of Appeals found that the specifications for the trucks in question were worked out in Arizona between the petitioner's technical employees and mine company personnel; that the trucks were custom-made for use in each particular Arizona open-pit mine; that the purchase orders for the trucks were accepted at the petitioner's Phoenix office; that the invoicing and payment went through the petitioner's Phoenix office; and that final inspection and acceptance of the trucks occurred at the Arizona mine sites. (See Petitioner's Brief, Appendix "A", pp. 11-12).

In view of the foregoing facts, the respondent respectfully submits that there is more than ample support for the

lower court's ruling. As was stated in this Court's opinion in the Standard Pressed Steel decision, supra, 419 U.S. at 562, "... the question in the context of the present case verges on the frivolous."

Clearly, the situs of the substantial business activities which transpired herein was Arizona. None of the other states involved in the sales would have had jurisdiction to tax the petitioner's activities. Those out-of-state activities upon which petitioner places such great reliance were plainly incidental and tangential to its extensive business activities within Arizona. The petitioner's arguments as to lack of nexus, absence of apportionment and conjectural multiple taxation simply cannot withstand scrutiny under the Standard Pressed Steel decision, supra.

Moreover, the decision in Complete Auto Transit, Inc. v. Brady, supra, simply reinforces this conclusion. Although the petitioner dismisses this most recent decision of this Court as being inapplicable, even a brief examination of the ruling will reveal its pertinence. As footnote 6 of the opinion demonstrates (Complete Auto Transit, Inc. v. Brady, supra at 1078), this Court was well aware of the questions of nexus, discrimination, apportionment and relationship to state services. Similarly, although the Complete Auto Transit case, supra, had not yet been decided, the Arizona Court of Appeals was also aware of these issues and properly upheld the tax under, inter alia, the General Motors Corp. and Standard Pressed Steel cases, supra, cited in the aforesaid footnote 6.

In addition, the Complete Auto Transit case, supra, cites (97 S.Ct. at

1079, n. 8) Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940). Of materiality to the present dispute is this Court's ruling in the J. C. Penney case, supra, 311 U.S. at 444-445:

"The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction."

(Citations omitted)

In this regard, the issue was discussed by the Washington Court of Appeals in the Standard Pressed Steel case, supra, (10 Wash.App. 45, 50, 516 P.2d 1043, 1047 (1973), citing Dravo Corp. v. City of Tacoma, 80 Wash.2d 590, 599, 496 P.2d

504, 510 (1972)) thusly:

"The fact that the value which the gross receipts measure is, in large part, the result of activity outside the territorial limits of the taxing jurisdiction does not mean the gross receipts are not fairly related to the activity within the jurisdiction. There is no constitutional objection to resorting to extraterritorial elements in determining the measure of a tax."

(Emphasis Court's;  
citations omitted)

In the case at bar, the petitioner has failed to demonstrate the special and important reasons required to justify the grant of its petition for certiorari under United States Supreme Court Rules, Rule 19. The petitioner has demonstrated no violations under either Article I, Section 8, Clause 3 or the Fourteenth Amendment. The lower court opinion rests upon a sound factual and legal basis and in no way conflicts with this Court's prior rulings upon which the petitioner relies.

CONCLUSION

For the foregoing reasons, the respondents pray that the instant petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 1977, three copies of the MEMORANDUM FOR RESPONDENTS IN OPPOSITION were mailed postage prepaid to

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I further certify that all parties required to be served have been served.

BRUCE E. BABBITT  
Attorney General

/s/ JAMES D. WINTER  
JAMES D. WINTER  
Assistant Attorney General  
Attorneys for Respondents

SUBSCRIBED AND SWORN to before me  
this 15th day of July, 1977.

/s/ Leone Hohman  
Notary Public

My Commission expires:

March 19, 1980

[SEAL]